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Congress of the United States

House of Representatives

COMMITTEE ON HOUSE ADMINISTRATION

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ONE HUNDRED SIXTEENTH CONGRESS

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July 18, 2019

Christy McCormick
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Silver Spring, MD 20910

Thomas Hicks
Commissioner
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Benjamin Hovland
Vice Chair
U.S. Election Assistance Commission
1335 East West Highway, Suite 4300
Silver Spring, MD 20910

Donald Palmer
Commissioner
U.S. Election Assistance Commission
1335 East West Highway, Suite 4300
Silver Spring, MD 20910

Dear Chairwoman McCormick, Vice Chair Hovland, Commissioner Hicks, and
Commissioner Palmer:

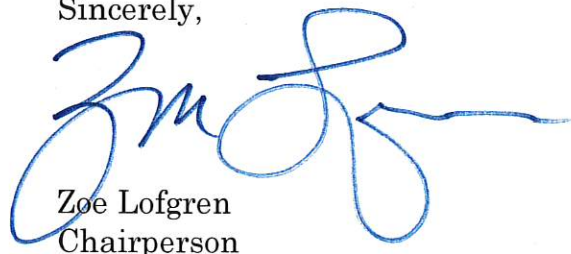
Thank you for your responses to my letter dated June 14, 2019 following your
appearance before the Committee on House Administration on May 21, 2019, at the
hearing titled "Oversight of the Election Assistance Commission."

Attached, please find my follow-up questions based on your responses.

Please provide written responses by **Tuesday, August 12, 2019** to Sean
Jones, Legislative Clerk, in Room 1309 of the Longworth House Office Building and
electronically to sean.jones@mail.house.gov.

If you have any questions concerning this matter, please feel free to contact
the Committee at (202) 225-2061. Thank you for your attention to this matter and I
look forward to your prompt response.

Sincerely,



Zoe Lofgren
Chairperson

Question 8. Your answers to Parts a. and b. are nonresponsive, as there is no HAVA Section 205(a)(3)(C). Please clarify.

We believe you may have been referring to HAVA Section 204(a)(3)(C). If this is the case, you note that the General Counsel will serve as Acting Director in the event of a vacancy in the Executive Director position. While your QFR answers reflect that you are unsure of the dates of expiration of the terms of both your Executive Director and General Counsel, it appears that their concomitant appointment suggests their terms will expire simultaneously, such that the General Counsel could not take over as Acting Executive Director. As you noted, your 2015 Policy Statement *only* refers to a succession plan when there are no Commissioners. We would like to understand the succession plan in other circumstances.

- a. If there are four Commissioners, and a vacancy arises in the Executive Director position, and there is a deadlock among the Commissioners, what is the succession plan, title by title? Who would make the decision about who becomes the Executive Director?
- b. If there are four Commissioners, and a vacancy arises in the General Counsel position, and there is a deadlock among the Commissioners, what is the succession plan, title by title? Who would make the decision about who becomes the General Counsel?
- c. If there are four Commissioners, and vacancy arises in both the Executive Director position and the General Counsel position, and there is a deadlock, what is the succession plan, title by title?
- d. What document or authority is the source for each of the aforementioned succession plans?
- e. Given the high number of unfilled positions at the EAC, should a vacancy in both the Executive Director and General Counsel position arise, as of today, what is the name of the individual who would then fill the Acting Executive Director title, and what is that person's current title?

Your answer to Part c. is similarly nonresponsive. You answer with your 2015 Policy Statement document, which establishes a succession plan if there are "no Commissioners."

- f. Per the question, please provide the succession plan when there is no *quorum* of Commissioners.
- g. Please provide the source for this succession plan.

In Part d., you state that, in the event there were no quorum of Commissioners and no General Counsel, the Executive Director can appoint a General Counsel.

- h. With a specific citation, under what authority would the Executive Director appoint an Acting General Counsel?

- i. If there *is* a quorum and no General Counsel, and no agreement among Commissioners on the appropriate candidate to serve as General Counsel, are you suggesting the authority to choose an Acting General Counsel would similarly fall to the Executive Director?
- j. Under what specific authority?

In Part e., you note HAVA does not provide for a succession plan for the General Counsel.

- k. You have some authority to develop, or oversee the development of, internal personnel policy. Can you commit to developing a succession plan for the General Counsel?

Question 9. This question relies on statutory requirements under HAVA, which Commissioners initially pointed to as barring them from starting an executive search process prior to the announcement of a vacancy.

As you note, the EAC's practice has "historically" been to post a vacancy announcement and then have the advisory boards begin their search process, but given the circumstances, we were pleased to see that you agree that the EAC should create a policy that would make preliminary inquiries "a few months" prior to a potential vacancy to determine if the incumbent Executive Director and/or General Counsel are interested in being retained for an additional term, and to ascertain if other parties are interested.

You did refer to your concern that this "may not be possible" for two reasons: your Notice and Comment Policy and the conflict with your current General Counsel. First, your Notice and Public Comment Policy states "To that end, this policy requires EAC to provide the public an opportunity to comment on any proposed policy or rule of general applicability (those impacting outside parties), even when such public comment is not otherwise required by law." Per the Notice and Public Comment Policy, the definition of a "policy of general applicability" addresses issues such as program manuals for testing and certification, and guidance on implementation or administration of HAVA or NVRA—the personnel matter of establishing an informal inquiry to discern the potential intentions of your incumbent Executive Director and General Counsel, and the interest of outside parties in those positions, are not of the same type of matter contemplated in the "policy of general applicability." Neither do those informal inquiries fall under the definition of "proposed policy or rule," as defined in the Notice and Public Comment Policy, as such rule is simply "Any policy, advisory, manual, procedure, regulation or rule covered hereunder that the Commission has voted affirmatively to post for public comment." Pursuant to the second part of the definition, the Commission would have to affirmatively vote to post the informal inquiry for public comment, and is not required to do so. Thus, your policy obligations to provide notice and comment would not be present in this

instance, and the policy's own definitions suggest you may proceed with the inquiries you mention, and may even set up preliminary efforts to begin collecting candidates for consideration in the event of a vacancy. We additionally reference your own conclusion, per Question 8 Part d., that when there is no quorum of Commissioners and no General Counsel, the Executive Director can appoint a General Counsel. This circumstance is not addressed in HAVA, and is not addressed in your 2015 Policy Statement either, yet to our knowledge, the policy you reference was not subject to Notice and Comment. Your conclusion about this authority of the Executive Director, absent a Notice and Comment period per your policy, further suggests Notice and Comment is not required of personnel matters.

To your second concern, while we agree your General Counsel is conflicted out of this consideration, it is our understanding you have recently hired a second attorney. This attorney would not be conflicted out and would be available to serve should any legal questions arise concerning this preliminary inquiry a few months before the potential vacancy escalates into a crisis.

Finally, while the above demonstrates how a preliminary search satisfies your policy obligations, we agree it is important to address your statutory obligations as well. Per Sec. 204(a)(3)(A), HAVA requires the advisory boards to begin a search "When a vacancy exists." Additionally, HAVA does not expressly preclude the Commission or the Advisory Boards from beginning such a process immediately, perhaps even at your direction. (As you note, the Boards are merely advisory and are bound by the advisory boards' statutory mandates in HAVA, so regardless of whether the advisory boards started an informal or formal search immediately at your direction or at the House's request, they would still be bound by statute to "each appoint a search committee to recommend at least three nominees for the position" when a vacancy exists, in addition to any preliminary action they had already taken.) Thus, it is absolutely possible to meet your statutory obligations with respect to the Standards Board and Board of Advisors while also directing a formal or informal search to begin immediately.

- a. Having resolved your concerns regarding the EAC's Notice and Public Comment Policy obligations, your legal advisor capacity, and your statutory obligations through the above, can you commit to begin making the inquiries you mention in your QFR responses (specifically inquiring "if the incumbent Executive Director and/or General Counsel are interested in being retained for an additional term, as described in HAVA, and to ascertain if other parties are interested in the positions") by August 12, 2019, which is within "a few months" of any potential vacancies in November 2019?

Question 10. In your answer to this question regarding the availability of holdover status for staff, you note you "do not anticipate a legal opinion from [your] General Counsel," likely because he would be conflicted out on this question. It is our

understanding that you just hired a new attorney who would not be conflicted out of providing a legal opinion on this question. We request that you allow this non-conflicted counsel to handle this question, which should allow you to proceed on this critical issue.

- a. Can you commit to having a legal opinion on this matter provided by your new counsel by August 12, 2019?

In your answer to Question 10, you reference questions you have asked to “federal personnel authorities.”

- b. Who are these authorities?
- c. What is their authority to answer this question?
- d. What specific questions did you ask them?
- e. When do you anticipate this answer?
- f. Given the term expiration likely in November, we request that you submit the answers from the “federal personnel authorities” by August 12, 2019, to provide ample time for planning in the event of a transition.

Question 11. We appreciate your privacy concerns.

- g. Please provide the total number of individual candidates whose names were ranked by the each of the respective boards, the Board of Advisors and the Standards Board.
- h. For each list, please note what rank your current Executive Director was on each of those lists.
- i. Please note if your current Executive Director did or did not appear on each of the respective lists.

Question 12. In your answer, you reference questions you have asked to “federal personnel authorities.”

- a. Who are these authorities?
- b. What is their authority to answer this question?
- c. What specific questions did you ask them?
- d. When do you anticipate this answer?
- e. Given the term expiration likely in November, we request that you submit the answers from the “federal personnel authorities” by August 12, 2019 to allow for planning.

Question 13. In your answer, you reference questions you have asked to “federal personnel authorities.”

- a. Who are these authorities?
- b. What is their authority to answer this question?
- c. What specific questions did you ask them?

- d. When do you anticipate this answer?
- e. Given the term expiration likely in November, we request that you submit the answers from the “federal personnel authorities” by August 12, 2019 to allow for planning.

Question 14. Given the analysis provided in Question 8, and the Commission’s interest in beginning preliminary inquiries so as to avoid an inopportune vacancy in November, it would be appropriate for the Commission to begin the “require[d] deliberation and a consensus of the Commissioners on how to proceed.”

- a. Can you commit to arriving at a consensus on how to proceed by August 12, 2019, allowing sufficient time to begin an informal or formal search process?

Question 17. In your discussion of the hiring process for Election Technology Specialists as additions to the Testing and Certification staff, you note you received a total of 76 applications, and interviewed exactly 2 candidates.

- a. Were Paul Aumayr and Jessica Bowers among those 76 candidates who applied for this specific position?
- b. On what date did the interview occur for Paul Aumayr?
- c. On what date did you offer him the position?
- d. On what date did you publicly announce he had been hired?
- e. On what date did the interview occur for Jessica Bowers?
- f. On what date did you offer her the position?
- g. On what date did you publicly announce she had been hired?
- h. On what basis did you decide to interview only 2 out of 76 candidates?
- i. Is the EAC committed to considering and hiring a diverse pool of candidates? If yes, how did you incorporate this commitment in your hiring process for these openings?
- j. If you do have a diversity policy or plan, please share it.

Overall, for the Director of Testing and Certification and the two open Testing and Certification positions, you received 96 total applications, and the EAC interviewed only three people (one internal) and hired exactly those three people.

- k. This does not suggest a robust process. Please explain.
- l. How does this process overall meet diversity best practices in hiring?

Question 19. In Part g, you note that “when individuals travel on EAC business, travel expenses are paid by the EAC,” yet in Part h you note that for Fiscal Year 2018 and the first half of Fiscal Year 2019, “the cost of travel covered by the agency in this regard was \$0.” These two facts do not seem compatible unless no employee with a duty station outside of Silver Spring, Maryland travelled to EAC headquarters on EAC business in that entire time period.

- a. Are the five individuals with duty stations outside of Silver Spring, Maryland reimbursed by the EAC when they travel to and from the Silver Spring office for EAC business?
- b. Does the \$0 figure for the period of Fiscal Year 2018 and the first half of Fiscal Year 2019 indicate that there has been no travel for any of the individuals with a duty station outside of Silver Spring, Maryland to and from EAC headquarters for EAC business in that entire time period?
- c. If not, please explain the \$0 figure.

In Part f, you note two Commissioners and three employees have duty stations away from EAC headquarters in Silver Spring, Maryland, which raises concerns about how much of taxpayer money is being used to accommodate travel between duty stations and agency headquarters when the agency is avowedly struggling with its current funding levels.

- d. When Chairwoman McCormick travels to Silver Spring, Maryland from her duty station in Williamsburg, Virginia and back, has the EAC ever reimbursed her for this travel?
- e. If not, at whose expense does this travel occur?
- f. Since her duty station was established in Williamsburg, Virginia, how much in total has the EAC covered or reimbursed Chairwoman McCormick for travel between Silver Spring, Maryland and her duty station in Williamsburg, VA?
- g. Since establishing her duty station in Williamsburg, Virginia, how many times would you estimate Chairwoman McCormick has actually been present at EAC headquarters?
- h. When Commissioner Palmer travels to Silver Spring, Maryland from St. Johns, Florida and back, has the EAC ever reimbursed him for this travel?
- i. If not, at whose expense does this travel occur?
- j. Since his duty station was established in St. Johns, Florida, how much has the EAC covered or reimbursed Commissioner Palmer for travel between Silver Spring and his duty station in St. John's Florida?
- k. Since establishing his duty station in St. Johns, Florida, how many times would you estimate Commissioner Palmer has actually been present at EAC headquarters?
- l. Please provide the total the EAC has spent on each of the following respective individuals travelling between their duty station and Silver Spring, Maryland:
 - a. Margaret Ollove
 - b. Jessica Bowers
 - c. Jerome Lovato
- m. On what grounds were certain individuals allowed to establish their duty stations a far distance from the EAC's headquarters?

- n. Is there an internal policy on the establishment of duty stations away from EAC's headquarters? If so, please share.
- o. Who signed off on the establishment of these duty stations?
- p. Under what authority did the individual signing off on these duty stations sign off on the distant duty stations?
- q. Are travel costs for distant duty stations automatically paid, or are they reviewed and approved by someone? Who is that individual?

Question 23. In Attachment G of your responses, Current Commissioner Donald Palmer is listed as an individual hired during Executive Director Brian Newby's tenure at the EAC. Donald Palmer was paid \$73,946 for part-time work at the EAC.

- a. What work was Mr. Palmer then doing for the EAC? Please provide a detailed list of deliverables and major accomplishments in this part-time role.
- b. Please provide Mr. Palmer's contract, or multiple contracts, for the period of his employment with the EAC as a part-time employee, and as a Commissioner.
- c. Besides the Bipartisan Policy Center, what additional clients if any did Mr. Palmer work for during his time as a part-time employee with the EAC?

Other part-time employees you noted in Attachment G were paid in the range of \$1,170 to \$8,440, and had assignments that lasted for about three months, while not working for any other employers.

- a. Please explain the choice to retain Mr. Palmer for over a year as a part-time employee, as compared to other short-term part-time employees.
- b. Please explain the relative pay disparity between Mr. Palmer and other part-time employees (as even accounting for the fact that Mr. Palmer worked a longer period, his rate of pay seems significantly higher).
- c. Please provide your conflict of interest assessment for Mr. Palmer maintaining employment at the Bipartisan Policy Center while also being paid by the EAC.
- d. What work was Mr. Palmer doing with the Bipartisan Policy Center?

Mr. Palmer's nomination to the EAC is noted as received in the Senate on July 18, 2018. Attachment G notes that Mr. Palmer was in the employ of the EAC at this time, having served as a part-time employee from January 1, 2018, to February 4, 2019. In fact, Mr. Palmer's part-time work appears to have ended on February 4, 2019, more than a month after he was *confirmed* to become a Commissioner by the Senate on January 2, 2019. Thus, it seems that while Mr. Palmer was awaiting confirmation (for a position in which he would have the power to extend the term of the current Executive Director), and even after he was confirmed, he was being paid by the same Executive Director, via the EAC, for part-time employment. This raises at least the appearance of impropriety, if not impropriety itself.

- e. Who approved Mr. Palmer's part-time employment contract?
- f. How was his pay decided?
- g. Who approved his pay?
- h. At any time, was there any internal deliberation or discussion about the propriety of these multiple roles for Mr. Palmer—as part-time employee, nominee, and then confirmed appointee?
- i. If they did occur, please describe the content of the discussions, and between what parties did they occur?

As you are aware, the Committee is concerned about the possibility of a vacancy in the Executive Director position when Mr. Brian Newby's term expires some time in November 2019. As you correctly noted during the EAC's Oversight Hearing, HAVA Sec. 204(a)(2) provides that "An Executive Director may serve for a longer period only if reappointed for an additional term or terms by a vote of the Commission."

Commissioner Palmer will serve as an important vote in the decision of whether to continue your existing Executive Director's term. Yet Commissioner Palmer was hired to the EAC by the current Executive Director, and received at least \$73, 946 from the agency during the current Executive Director's term, raising questions about the appearance of a quid pro quo and a conflict of interest with regard to voting on Mr. Newby's continuance.

- j. Does Commissioner Palmer have an ethics waiver to vote on continuing Mr. Newby's tenure as Executive Director since he was being paid by Mr. Newby as a part-time employee while Mr. Newby was Executive Director?
- k. Should he recuse himself from this vote?
- l. Please provide the Committee with a formal ethics opinion on this question by August 12, 2019.

We appreciate the agency's willingness to be forthcoming about its personnel decisions. Per Question 23, the Committee requested information on "all staff, consultants, or any other person paid any amount during Executive Director Brian Newby's tenure at the EAC." Responding to our question, you noted in Attachment G that Mr. Palmer's employment with the EAC as a part-time employee ran from January 1, 2018, to February 4, 2019. Yet in an e-mail from Cristy McCormick to Andrew Kossack dated July 30, 2017 and recommending that "we consider hiring Don Palmer to oversee/consultant [sic] on the data project," of the Presidential Advisory Commission on Election Integrity (or the "Kobach Commission") Ms. McCormick referenced that Mr. Palmer is "currently working on an NVRA project for the EAC as a contractor." Mr. Newby was appointed in November 2015, so the contract referenced here by Ms. McCormick would have been awarded during Mr. Newby's tenure. Yet this contractor position was not reflected in your answers to the Committee.

- m. Please provide clarity on the dates of Mr. Palmer's employment with the EAC.

- n. Ms. McCormick referred to Mr. Palmer as an EAC consultant as of July 2017. Please provide his contract for this specific position.
- o. Please provide clarity on whether Mr. Palmer was initially a consultant, and subsequently hired as a part-time employee. If so, please provide the total amount paid for his initial consultancy distinct from the \$73,946 you mentioned in Attachment G.
- p. What were Mr. Palmer's major deliverables and accomplishment during his consultancy?
- q. In that email, Ms. McCormick refers to Mr. Palmer as "a believer in the cause" while referring him to work in elections oversight. Please explain Ms. McCormick's statement.

Additional Questions.

Supplemental Question 1. Committee on House Administration staff have twice privately requested a copy of the OPM Report referenced during the Committee's Oversight hearing. EAC staff has not provided a copy to this Committee and has not responded to either of the two requests.

- a. Please provide a copy of the OPM report with your answers to these questions.

Supplemental Question 2. On July 14, 2019 the AP reported that voting machines provided by two of the three major vendors (ES&S and Hart) run on dated versions of Microsoft Windows. On January 14, 2020—the 10-year anniversary of the release of Windows 7—Microsoft will stop supporting security updates for Windows 7. That Microsoft will cease support is not a new revelation. As early as 2012 it was well known that in 2020 Microsoft would stop supporting security patches for Windows 7. The AP story also reported that the EAC has recently certified voting machines that run on Windows 7 (as recently as the spring of 2019) and will not have security updates from Microsoft within 6 months of certification.

- a. Does the EAC certification process evaluate the underlying software the machine runs on? If so, how?
- b. Does the EAC de-certify machines that run on Windows (or other operating systems) when the parent company ceases to put out security patches?
- c. Would a machine fail certification if it were running an operating system that was no longer being supported for security patches?
- d. Is there a cut-off for how far into the future the operating system needs to support security patches to pass certification?
- e. Would a machine pass if the operating system was not going to be supported in one month? Six months?

- f. How will the EAC handle ES&S products running on Windows 7 after patches are discontinued on January 14, 2020?
- g. Would the EAC decertify those machines? If not, why not?
- h. For ES&S machines that run Windows 7, does the EAC need to recertify a machine if ES&S subsequently upgrades to Windows 10? If so, are there any machines currently in the certification process? What is the best estimate of when the machines will be certified?